ROSEVILLE TELEPHONE COMPANY

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FEDERAL COMMUNICATIONS COMMISSION
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OFFICE OF THE SECRETARY

July 6, 1995

Federal Communications Commission
Washington, DC 20554

RE: Further Notice Of Proposed Rule Making
PP Docket No. 93-253 and GN Docket Nos. 90-314 and 93-252

Dear Commissioners:

Roseville Telephone Company ("RTC") hereby submits its comments regarding the Commission's Further Notice of Proposed Rule Making in PP Docket No. 93-253, FCC 95-263, released June 23, 1995 ("FNPRM"), addressing the impact of the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena ("Adarand") upon the licensing of broadband Personal Communications Service ("PCS") facilities in the C Block.

RTC is an independent local exchange carrier operating within the State of California. It serves less than 100,000 access lines, and therefore constitutes a "rural telephone company" under Section 24.720(e) of the Commission's Rules. RTC is also a small business which qualifies as an "entrepreneur" for purposes of participation in the Entrepreneurs' Block auctions. However, its three-year average gross revenues exceed the $40 million criterion presently necessary to qualify for the 25 percent bid credit and favorable installment payment terms which the FNPRM now proposes to make available to certain "small businesses".

RTC agrees with the Commission that the C Block auction should proceed without further delay or legal uncertainty. Particularly because the A and B Block auction winners are now free to construct and operate their PCS systems, additional delay will substantially decrease the value of C Block licenses, and curtail the ability of designated entities and other

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entrepreneurs to compete in a wireless market already comprised of the new Major Trading Area ("MTA") PCS licensees and existing cellular and SMR operators. RTC applauds the Commission's swift response to Adarand, and supports the Commission's goal of eliminating issues that could delay the implementation of C Block systems.

However, RTC is deeply concerned that the FNPRM's proposal to address Adarand by increasing the auction benefits of certain small businesses to the levels previously available only to certain small businesses owned by minorities and/or women will create a massive and unreasonable disparity in the treatment of two arbitrary classes of small business that will also be challenged in the courts. Put simply, the FNPRM's proposals drastically slant the auction "playing field" in favor of those small businesses that can be configured to meet the $40 million average gross revenues test in Rule Section 24.720(b), while crippling the auction plans and prospects of existing designated entities and other small businesses that qualify as "entrepreneurs" but are not configured to meet this arbitrary, but now all-important, gross revenue standard.

Therefore, RTC believes that the Commission should make the same bid credits and installment payment terms available to all small businesses that qualify to participate in the C Block auction. In the alternative, the Commission should maintain the existing differentials in the bid credits (i.e., 10 percent) and installment payment terms (no more than one percentage point of interest and two years of interest-only payments) available to those small businesses that meet the "$40 million gross revenues" test vis-a-vis other small businesses that qualify as "entrepreneurs." These approaches would be fair and reasonable, but do not employ an arbitrary and inconsistent gross revenues factor to favor one class of small businesses over another in a manner that could be subject to legal and/or administrative challenges that could further delay the C Block auction.

C BLOCK AUCTION SHOULD MOVE FORWARD EXPEDITIOUSLY

RTC believes that further delay of the C Block auction will substantially impair the competitive prospects of entrepreneurs looking to enter the wireless telecommunications market. As the Commission is well aware, cellular operators have been preparing for the onset of broadband PCS competition during the past year by expanding their systems and by signing up millions of previously ignored smaller-volume users. With the Commission's June 23, 1995 grant of the applications of the A and B Block auction winners, two more wireless service providers are now free to construct their systems and to begin signing up customers in every market throughout the nation. Hence, under the very best of conditions, C Block licensees can expect to be the fifth wireless service provider in most significant markets (and the sixth provider where Enhanced SMR systems have become operational). If the current delays are prolonged, the substantial head starts achieved by the cellular and A and B Block operators will ensure that C Block auction winners will enter highly saturated wireless markets.

In addition, delays have already made it difficult for C Block licensees to construct their systems in a timely and economic manner. Whereas the Commission licensed cellular systems throughout the nation over a ten-year period (starting in 1982 and ending for practical purposes in 1991), it already has licensed two broadband PCS systems for each MTA in the nation on June 23, 1995, and will license a third system for each Basic Trading Area ("BTA") after completion of the C Block auction. While this rapid licensing is a major administrative feat of which the Commission should be proud, it also will create substantial competition for scarce skilled labor, equipment, antenna sites, and financial resources. For example, the nationwide licensing of broadband PCS systems within a relatively brief period will create a massive "bottleneck" in the order filling "pipeline" of wireless switch, antenna site and customer equipment manufacturers. This bottleneck will permit A and B Block winners receiving a head start in the licensing process to order and receive their equipment first. Moreover, as C Block licensing delays increase, the A and B Block winners will have more time to order additional equipment, and thus to place the eventual C Block winners further back in the delivery line when they place their initial equipment orders. The same delays will have equally adverse impacts upon C Block licensees as they seek experienced personnel, scarce antenna site facilities, construction and installation services, and financing. Likewise, negotiation of agreements for interconnection, rights of way, facilities sharing and other matters would be impeded if C Block licensees are forced to be the much-delayed fifth or sixth wireless market entrant.

Hence, the Commission should maintain the value and competitive prospects of C Block licenses by sticking to its announced August 29, 1995 date for commencing the auction. However, it should also take adequate steps to ensure that all qualifying C Block entrepreneurs can compete equally with one another, as well as with MTA licensees and cellular incumbents.

EXISTING SMALL BUSINESS DIFFERENTIATION IS ARBITRARY

When Congress granted the FCC authority to use competitive bidding as a means of distributing certain licenses in the Omnibus Budget Reconciliation Act of 1993, it directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. Section 309(j)(4)(D). However, Congress did not expressly define any of these "designated entities."

Whereas the Small Business Administration ("SBA") defines a "small business" in the telecommunications industry as one having: (a) a maximum net worth of $6 million and a maximum net income of $2 million, and/or (b) less than 1,500 employees, the Commission determined that this definition could be modified if an alternate definition was "more appropriate for capital intensive services." Second Report and Order, PP Docket 93-253, (Released April 20, 1994) at para. 271. For its broadband PCS rules, the Commission adopted a recommendation by the SBA's Office of Advocacy that a "small business" be defined as "any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of $40 million." Fifth Report and Order, PP Docket 93-253, (released July 15, 1994) at para. 175. However, the SBA had never proposed that the "$40 million gross revenues" dividing line be carved in stone; rather, it noted only that the $40 million gross revenues criterion represented "an adequate compromise" and stated that the Commission could well "determine that an even larger figure is the most apt small business demarcation." Comments of SBA Office of Advocacy (November 10, 1993) at p. 11.

Nowhere in the Fifth Report and Order or elsewhere has the Commission pointed to any evidence that entities with attributed gross revenues of $40 million or less have significantly greater difficulties in raising capital than entities with attributed gross revenues between $40 million and $125 million. RTC knows of no studies or evidence indicating that companies with $40 million or less of gross revenues pay higher interest rates, or are forced to accept less favorable financing terms, than companies with $40-to-125 million in gross revenues. In fact, a start-up company with no history of gross revenues, but with $500 million of assets, will generally obtain much more favorable financing than an operating entity with a history of gross revenues, but substantially fewer total assets. Yet, the Commission's "small business" definition will grant these wealthy start-up entities significant auction advantages over much smaller entities. There is no support for this arbitrary differentiation between otherwise qualified entrepreneurs. Therefore, significant auction advantages should not be conferred on one group of small businesses over other small businesses on the basis of this differentiation.

EXISTING "SMALL BUSINESS" CRITERION IS NOT PROPERLY TARGETTED

The Commission's existing broadband PCS rules contain "consortium" and "control group" exceptions providing substantial (and, as proposed, massive) auction benefits to entities with far more than $40 million in available gross revenues, while excluding much smaller entities from the same benefits. For example, Section 24.720(b)(3) allows a "conglomerate" of twenty separate companies having $39 million each (or a total of $780 million) in gross revenues to qualify for "small business" benefits, while a single existing business with $40.1 million in gross revenues is ineligible for these same benefits. Likewise, Sections 24.709(b)(3)-(7) permit a start-up entity to define its "control group" so as to qualify for "small business" benefits while relying upon the financial resources of one or more large corporations having substantial (up to 25 percent) equity interests, but these same rule sections exclude existing entities with $40.1 million in average gross revenues.

Put simply, under the Commission's proposed rules, the "size" of the entity is not the primary factor for distinguishing "small businesses." Rather, the average gross revenues of an applicant-defined "control group" is the sole criterion. Hence, start-up operations with substantial assets and borrowing power, but no history of gross revenues, are clearly and substantially favored as "small businesses" over much smaller existing entities that have real problems raising capital. Likewise, certain types of corporate and partnership configurations containing Fortune 500 companies are favored over small companies having access to substantially fewer gross revenues and total assets. In sum, the narrow gross revenues focus of the "$40 million" test, as well as the readily manipulated exceptions thereto, ensure that it will confer auction benefits upon many large companies, while excluding many of the existing small businesses which Congress wanted to participate in spectrum auctions.

THE PROPOSED CHANGES SIGNIFICANTLY INCREASE THE DISPARATE TREATMENT OF SMALL BUSINESSES

At the time that the Commission adopted its "$40 million gross revenues" test, the foregoing weaknesses and discrepancies did not stand out because the benefits afforded to a "small business" vis-a-vis other qualified entrepreneurs were not as significant those now proposed. Specifically, the Commission provided a 10 percent bid credit, plus slightly more favorable installment payment terms to entities whose "control groups" qualified as "small businesses" vis-a-vis other entrepreneurs whose attributed gross revenues are slightly higher.

However, in light of the Supreme Court's recent ruling in Adarand and the stay issued by the U.S. Court of Appeals for the District of Columbia Circuit in Telephone Electronics Corporation v. Federal Communications Commission (No. 95-1015), the Commission has proposed to eliminate all race and gender-based provisions in its broadband PCS rules applicable to C Block auctions. It plans to do this by increasing the benefits available to "small businesses" to the level of benefits previously available to "small businesses owned by members of minority groups or women." The effect of this proposal is to create a massive gulf between small businesses whose control groups can meet the "$40 million gross revenues" test versus small businesses whose control groups cannot. This gulf -- which is comprised of a 25 percent bid credit, 2.5-to-3.5 percentage points of interest, and 5-to-6 additional years of interest-only payments -- tilts the auction "playing field" substantially in favor of start-ups having substantial assets and other entities whose control groups can be configured to meet the "$40 million gross revenues" test. Rural telephone companies such as RTC, as well as other small businesses with significant operating histories, are placed at a virtually insurmountable competitive disadvantage.

As a practical matter, the proposed rules permit an entity that can manipulate its "control group" so as to qualify as a "small business" to bid up to $4 million (but actually pay only $3 million) for a specific BTA license that can rationally be valued only at $3 million. Obviously, another small business unable to contrive its "control group" would have to bid and pay more than $4 million (or over 133% of the value of the license) in order to remain competitive during the auction. This is not a mere hypothetical situation. Rather, the designated entities eligible for 40 percent bid credits in the Regional Narrowband PCS auction bid substantially more for Frequency Block Nos. 2 and 6 than did the non-designated entities that won the comparable paired facilities in Frequency Block Nos. 1, 3, 4 and 5. See Public Notice ("FCC Announces Results Of PCS Regional Narrowband License Auction) (November 8, 1994).

In addition, entities qualifying as "small businesses" in the C Block auction will enjoy substantial additional benefits worth millions of dollars -- in the form of the ability to make interest-only installment payments for six years (five-to-six years longer than other entrepreneurs) and the ability to pay a significantly lower interest rate (2.5-to-3.5 percentage points) than other entrepreneurs. The Commission has previously recognized that these installment plans "greatly enhance the ability" of their recipients to raise capital and to succeed against their auction competitors. Fifth Memorandum Opinion and Order, at para. 103.

The disparity inherent in these bid credits, installment payment terms and installment interest rates is obvious. In effect, the Commission is proposing to "stack the deck" in the auction in favor of those small businesses which can contrive their "control groups" to meet the arbitrary "$40 million gross revenues" test, and against those small businesses which cannot.

By increasing the auction benefits of "small businesses" to the level of those previously afforded to "small businesses owned by members of minority groups or women," the Commission may have proposed changes that are the "least disruptive" to plans and business relationships of prospective minority and female bidders who were in an advanced stage of planning for the C Block auction. Further Notice of Proposed Rule Making at para. 2. However, it has wreaked havoc upon the plans and business relationships of existing small business "entrepreneurs" such as RTC.

What constitutes a "small business" is unreasonably discriminatory at the least. RTC qualifies as a rural telephone company under tested precedents, but not as a "small business" under the Commission's new and readily-manipulated criterion. As a comparison, RTC has less than one-half of one percent of the attributable gross revenues of A and B Block auction winners such as AT&T ($66.8 billion) and PCS PrimeCo (over $31.3 billion), and is clearly a small business under any reasonable criterion. Until the release of the Further Notice of Proposed Rule Making, RTC had formulated its broadband PCS business plans upon the reasonable assumption that the primary C Block auction competitors for its desired rural markets would be "small businesses" and other entrepreneurs. Whereas the "small business" competitors would have enjoyed advantages during the auction (in the form of a 10 percent bid credit, one percentage point of interest, and an additional two years of interest-only payments), such conditions would have been difficult but surmountable. However, being forced to pay 133 percent (rather than 111 percent) of the value of its target markets[1] -- while paying 3.5 more percentage points of interest and getting six years less of interest-only payments -- is neither a fair nor a reasonably surmountable competitive situation. Rather, it is arbitrary and capricious because RTC, an existing, independent rural telephone company, lacks the ability to raise capital possessed by the vast majority of the start-up "small businesses" that have been formed for the purpose of taking advantage of the Commission's broadband PCS auction rules.

RTC believes that the only rational solution to these new disparities is for the Commission to permit all small businesses -- that is, both those qualifying as "entrepreneurs" and those qualifying as "small businesses" under its existing broadband PCS rules -- to obtain the same 25 percent bid credits, six-year interest-only installment payment terms, and ten-year U.S. Treasury obligations interest rate. This proposed plan would create a level auction playing field for all small businesses participating in the auction, and would eliminate incentives to "game" the auctions by creating start-up companies with hundreds of millions of dollars of assets, or otherwise configuring applicants and their "control groups" to include major corporations as allegedly "passive" investors. Whereas creating a neutral playing field for race and gender purposes is a good start, the Commission should go all the way and eliminate the arbitrary and capricious "small business" test and advantages in favor of an even playing field for all entrepreneurs.

CONCLUSION

RTC strongly supports the Commission's stated goal of minimizing the potential for delay of the C Block auction. However, RTC does not find that the mere exigency of an auction schedule constitutes a sufficient rationale for skewing the auction heavily in favor of

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[1] Put another way, RTC previously had to compete with "small businesses" able to bid up to $3.33 million for a license deemed to be worth $3 million. Now, RTC can expect to be forced to bid up to $4 million for the same license.

those small businesses created and/or configured to meet the Commission's arbitrary "$40 million gross revenues" test. The substantial gap proposed to be created between certain "small businesses" and other "entrepreneurs" will fail to fulfill the Commission's mandate of ensuring that small businesses such as RTC are afforded a meaningful opportunity to participate in the provision of new radio-based services.

RTC believes that the proposed disparity in the treatment of entrepreneurs renders the Commission's narrow and mis-targetted "small business" criterion wholly arbitrary, unreasonable and unjustified. While excluding many existing small businesses, it will confer 25 percent bid credits, significantly lower installment interest rates and extremely favorable installment payment schedules upon start-ups and other entities which can be contrived to include Fortune 500 and other large corporations. This result was not contemplated by Congress, nor by the Commission's prior orders and proposals in this docket, nor by small companies such as RTC which have developed business plans and auction strategies on the basis of the existing differentals in the Commission's auction benefits.

Rather than adopting its proposed rules, the Commission should offer the same bid credits, payment terms and interest rates to all entities qualifying as "entrepreneurs." At minimum, the Commission should maintain the very same bid credit, installment interest rate and installment payment term differentials presently applicable to "entrepreneurs" vis-a-vis "small businesses."

Respectfully submitted,
ROSEVILLE TELEPHONE COMPANY
Michael C. Campbell /jd
Michael C. Campbell
Vice President and
Chief Financial Officer

cc: All Commissioners